IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.A No.19 of 2006

Reserved on : November 26, 2007.

Decided on : 10.12.2007

Bahadur Singh **…Appellant.**

Versus

State of H.P. **…Respondent.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

The Hon'ble Mr. Justice Surinder Singh, Judge.

Whether approved for reporting?

For the Appellant : Mr. R.L. Sood, Senior Advocate, with Mr. Arjun Lall, Advocate.

For the Respondent : Mr. Som Dutt Vasudeva, Additional Advocate General, with Mr. D.S. Nainta, Deputy Advocate General.

Surjit Singh, Judge

Appellant Bahadur Singh has assailed the judgment dated 31st December, 2005 of the trial Court, whereby he has been convicted of an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/-, in default of payment of fine to undergo imprisonment for a further period of four years.

2. First, the prosecution version may be noticed. On 28th January, 2005, a police party headed by PW-4 HC Mohan Lal and comprising PW-1 Constable Pratap Singh, PW-2 HHC Jai Kishan, PW-3 Constable Netar Singh, as its other members, left Police Station, Kullu, for routine patrolling and detection of crime in a government

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Whether reporters of the local papers may be allowed to see the judgment?

vehicle, bearing registration number HP-34A-0162. The vehicle was being driven by Constable Pitamber Lal. The party reached at a point about 200-300 meters beyond Shirad Bridge near Raison and organised a *Naka*. Around 730 p.m., a man was seen coming with a small sized gunny bag on his shoulder. When he reached near the police party, search lights were switched on. On seeing the police people, the man threw the gunny bag and tried to run away backward. He was chased and overpowered at a very short distance and was brought back to the site where he had thrown the gunny bag. He was the appellant. He was asked what was there in the gunny bag. He told that it contained *Charas*. Constables PW-3 Netar Singh and PW-2 Jai Kishan were sent in two different directions to look for and bring some witnesses. They returned after 10-15 minutes unaccompanied by any witness and told PW-4 HC Mohan Lal that no witness was available owing to darkness and the place being desolate. Thereafter, PW-3 Netar Singh and PW-2 Jai Kishan were associated as witnesses by PW-4 HC Mohan Lal and the bag was searched. It was found to contain *Charas*, which on weighment was found to be 5.500 kgs. Two samples, each weighing 25 grams, were separated. Samples and the bulk *Charas* were made into three separate parcels. The parcels were sealed with a seal that produced the impression of letter “T” of English alphabet. Search and seizure memo was prepared. Appellant was taken into custody and was informed in writing that he had been arrested for an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act and was asked to give the name and particulars of some close relative/friend whom he wanted to inform about his arrest. He said that his wife be informed. A written report of the search and seizure was prepared and sent to the Police

Station through PW-1 Constable Pratap Singh for the registration of the case. Case property was deposited with the SHO, who resealed all the three parcels with his own seal, which produced the impression of letter "H" of English alphabet. NCB form had been filled on the spot and that was also handed over to the SHO alongwith the parcels containing the samples and the bulk case property. The SHO, after resealing the three parcels, deposited the same alongwith NCB form and sample impressions of the seals with the Moharrar Head Constable. One of the two sample parcels was sent by the Moharrar Head Constable, PW-5 HC Jia Lal, to the Chemical Examiner, who reported that the sample contained contents of *Charas.*

3. Appellant on being challaned was charged with offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act. He pleaded not guilty to the charge. Therefore, he was tried. Appellant took the plea that on 28th January, 2005, when he was present at a place called Fojal, a police party came there and enquired the whereabouts of his son Amar Singh and when he expressed ignorance, the members of that party physically lifted him and carried him to the Police Station in a police vehicle and Nambardar Shouju Ram and Ex-Pradhan of the Panchayat Budh Ram were present there and they saw the police people bundling him into the vehicle and carrying him away. He examined Shouju Ram as DW-1 to prove his plea. At the end of the trial, he was convicted and sentenced, as aforesaid.

4. During the course of the hearing of the appeal, learned counsel for the appellant drew our attention to certain contradictions and discrepancies in the testimony of the witnesses of search and seizure and argued that such discrepancies and contradictions not only

disproved the prosecution version but also probablized the defence plea that the appellant had not been taken into custody at the site of the alleged *Naka* at 7.30 p.m. but was picked up from village Fojal at 5 p.m. It was also urged by the learned counsel that the appellant had been beaten up by the police on the night intervening 29th and 30th January, 2005, when he was in their custody, after having been remanded in their custody by the concerned Magistrate and this fact also probablized the defence plea.

5. We have considered the aforesaid submissions made by the learned counsel in the light of the evidence on record. We have also perused the entire record carefully.

6. The first contradiction, which was pointed out by the learned counsel in the evidence, pertains to the time at which the police party reached Raison, a place 2 kms short of the site of *Naka*. PW-1 Pratap Singh stated that the party reached Raison Bridge at 6.30 p.m. PW-2 HHC Jai Kishan stated that the police party reached Raison at 7.15 p.m., PW-4 HC Mohan Lal, the Investigating Officer, stated that the police party reached Raison at 6.15 p.m. and stayed there for 30-45 minutes before proceeding towards Shirad side where the *Naka* was organised. Variation in the statements of the three witnesses, with regard to the time when they reached Raison, is insignificant. Incident took place in the month of January. The sun sets before six in that month and by then it is dark, particularly in hilly areas where because of the high mountains sun becomes invisible 2-3 hours before it actually sets. The variation in the testimony of the witnesses about the time when they reached Raison appears to be on account of the fact that it had grown dark by the time the police party reached Raison. All the witnesses are unanimous in saying that they reached the site of the

Naka around 7.30 p.m. and this fact pales the alleged contradiction into insignificance.

7. Next contradiction pointed out by the learned counsel pertains to the places where the police party halted on way to the side of the *Naka*. While PW-1 Pratap Singh stated that the police party halted only at HRTC Bus Stand, Sarwari (Kullu), PW-2 HHC Jai Kishan stated that the police party halted at Bus Stand Sarwari and then Akhara Bazaar and then it went straight to Raison. PW-3 HC Mohan Lal stated that the police party patrolled at Bus Stand Sarwari for 10 minutes, then got stuck up for half an hour in traffic jam in Akhara Bazaar, Kullu, then stopped at Bandrol Sabzi Mandi and also had a break of 30-45 minutes at Raison before reaching the site of *Naka*. These contradictions are also not very material. It has been stated by all the witnesses that they started from Police Station Kullu at 5 in the evening and reached the site of *Naka* around 7.30 p.m. The distance between the Police Station and the site of the *Naka* is very short and can be covered within 25-30 minutes by a light passenger vehicle. The Police party took more than two hours to cover this distance. This fact itself implies that the party must have halted at many places while performing journey. It is a matter of fact that the police people, when on patrolling and crime detection duty, do not go non-stop from the starting point to the end point, but stop at many points in between wherever there is some habitation to gather information (from their sources) about the law and order and crime situation.

8. Contradictions were also pointed out in the statements of the witnesses as to how the parcels were stitched and who stitched them. PW-2 HHC Jai Kishan stated that HC Mohan Lal was having with him a piece of cloth and bags were hand-stitched on the spot by

Constable Netar Singh and Pitamber Lal, the driver. When shown the bags, two sides of which were machine stitched, the witness did not reconcile his statement that the bags were prepared on the spot by using the cloth available with the Head Constable. PW-3 Constable Netar Singh stated that the Investigating Officer was already having the cloth bags with him and they were stitched on the spot by PW-1 Pratap Singh. These contradictions are also immaterial.

9. Another contradiction that was pointed out by the learned counsel was with respect to the man who held the search light when the appellant was chased after he tried to run away. PW-1 Pratap Singh stated that the search light was with PW-4 HC Mohan Lal, PW-2 HHC Jai Kishan stated that the search light was initially with the Investigating Officer and when the latter ran after the appellant to apprehend him he (the witness) took over the same from him (Investigating Officer PW-4 HC Mohan Lal) PW-3 Constable Netar Singh stated that the search light was with Constable Pitamber Lal, the driver of the vehicle. These contradictions are also minor and are bound to occur when the statements are recorded after considerable lapse of time --- eight months in this case.

10. Another contradiction pointed out by the learned counsel was with regard to the distance between the police party and the appellant when he was spotted first. The variation in the statements is from 5-7 paces to 10-15 metres, which is not very material.

11. Learned counsel urged that the aforesaid contradictions may not appear very material on the first look but when seen in the light of the defence plea that no *Naka* had been laid near Shirad nor was the appellant apprehended in the manner testified by the witnesses but he was picked up from village Fojal and forcibly carried to the Police

Station, go to show that the entire prosecution story is cooked up. He submitted that had the witnesses actually gone towards village Shirad, laid the *Naka* and arrested the appellant in the manner testified by them, so many contradictions and variations would not have been there in their testimony, with regard to the time when they reached Raison, the places where they halted on way to the site of the *Naka,* stitching of the parcels, holding of the search light and the distance from which the appellant was first spotted by the police people.

12. We are not convinced by the argument. The police party recovered huge quantity of *Charas*, weighing 5.500 kgs. The police party consisted of a Head Constable and Constables. Such low ranking police officials could not have been in a position to procure such a huge quantity of *Charas* and plant it upon the appellant. The market value of the recovered *Charas* is supposed to be much more than the gross salary of all the members of the police party for five-six months.

13. The abovestated position apart, appellant when produced before the Magistrate on 31st January, 2005, after the lapse of the period of police remand or on 29th January, 2005, for the first time, did not complain that he had been picked up from village Fojal, even though he did complain on 31st January, 2005 that he had been beaten up by the police people on the night intervening 29th and 30th January, 2005 and that the beating resulted in damage to his eardrum. Now, when the appellant had the courage to complain to the Magistrate, in the presence of the police people, on 31st January, 2005, that he had been beaten up by the police people when he was in their custody on the night intervening 29th and 30th January, 2005, it is not believable he would not have complained of much graver act of the police party, viz.

physically lifting him from village Fojal and planting upon him commercial quantity of *Charas*, the possession of which is so serious a crime that there is a statutory bar to the release of an accused even on bail.

14. DW-1 Shouju Ram, no doubt, stated that the appellant had been picked up from village Fojal near saw-mill of one Kumaru, but an overall reading of his statement suggests that he is a procured witness. The witness initially stated that he saw a van parked at Fojal and three persons standing near that van alongwith Bahadur Singh (the appellant) and then those police officials bundling appellant Bahadur Singh into that van and the van moving towards Kullu, but in the cross-examination he did not deny the suggestion that the appellant was arrested by the police at a police *Naka* at 7.30 p.m. near Shirad with *Charas.* The witness is a Nambardar of the area. He has admitted that he often appears, as a witness, in the Court in proof of documents attested by him as Nambardar. Now, if the witness is a Nambardar and keeps appearing in the Court quite frequently, he would not have kept quiet after the appellant, who hails from his area, had been subjected to high handedness by the police people, as testified by him.

15. From the above discussion, it is clear that the defence plea is nothing but an afterthought. Consequently, the same is rejected.

16. We have noticed that PW-4 HC Mohan Lal, PW-1 Constable Pratap Singh and other witnesses have testified that search and seizure had taken place, samples had been taken and parcels prepared and sealed, NCB forms had been filled-in and the appellant had been arrested and informed, in writing, of his arrest, when report Ex. PW-4/B for the registration of the case was recorded and the time

of recording of such report is 8.30 p.m., and within one hour it was not possible to do all these things because, as per evidence, first the appellant was overpowered, which might have taken atleast five minutes, then two Constables were sent to look for and bring witnesses, which took 10-15 minutes, as per testimony of the said Constables, thereafter, search was conducted and the stuff was weighed in six instalments and 10 minutes time must have been spent on this process also, the samples were taken and the samples and the bulk stuff were made into separate parcels and the parcels were sealed, which also might have consumed atleast 25 minutes, then search and seizure memo was prepared on which another 15-20 minutes would have been spent, then NCB form was filled-in, on which atleast 5 minutes would have been spent, then memo of arrest of the appellant was prepared, which process also might have consumed 10 minutes time and it was thereafter that report Ex. PW-4/B was prepared, which is quite lengthy and it might have taken 25-30 minutes time to record it. Thus, it was not possible to complete the recording of report Ex. PW-4/B by 8.30 p.m. nor could PW-1 Pratap Singh have reached with this report at Police Station, Kullu, at 9.30 p.m. (the time recorded in the FIR Ex. PW6/A). But this by itself cannot be a ground for disbelieving the evidence of search and seizure. It is a matter of common knowledge that often the police officials prepare the record of the investigation not on the spot, but on reaching the Police Station, especially when the crime is detected and investigated during night time. In this case also, it appears that the police, after conducting the search and seizure and preparing and sealing the parcels of the samples and the bulk stuff left the spot and went straight to the Police Station and there they prepared the documents, including report Ex.

PW-4/B. It may be noted that there were no independent witnesses in the case and the search and seizure was witnessed only by the police officials and this fact made it easier for the Investigating Officer (PW-4 HC Mohan Lal) to move to the Police Station, after search and seizure and sealing of the recovered stuff and the samples, alongwith all the members of the police party and to prepare the record of search, seizure and also to write report Ex. PW-4/B at the Police Station. This illegality on the part of PW-4 HC Mohan Lal does not illegitimatize the search and seizure. Illegality is in the matter of preparation of record of search and seizure and not in the search and seizure itself.

17. As an upshot of the above discussion, appeal against the finding of conviction is dismissed. We, however, feel that the sentence of four years imprisonment awarded by the trial Court for non-payment of fine is disproportionate. Therefore, we reduce the sentence of imprisonment, which the appellant may have to undergo, in case he defaults in payment of fine, to two years. With this modification in the judgment of the trial Court, we dismiss the appeal.

(Surjit Singh), J

December 10, 2007(sd) **(Surinder Singh), J**